In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 938

MONOLITH PORTLAND CEMENT CO., PETITIONER

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, LOS ANGELES DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is an income tax case involving the percentage depletion allowance (a given percentage, here 10 percent, of the "gross income from mining") and, more precisely, the scope of "mining" as statutorily defined for depletion purposes. In 1962, the court below held that "mining" included all of the processes employed by the taxpayer in manufacturing finished cement. 301 F. 2d 488; R. 749–772. We regarded this holding as contrary to *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76, and petitioned for a writ of certiorari. The Court granted the petition and summarily reversed the court below (371 U.S. 537; R. 774–776),

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holding that "mining" terminated when the limestone reached the crushed stage and that "This results in limiting the taxpayer's basis for depletion to its constructive income from crushed limestone, rather than from finished cement" (R. 776). The case was accordingly remanded to the District Court for disposition in accordance with the Court's opinion (R. 773, 776).

On remand, the district court denied petitioner's refund claim (R. 828–831). The taxpayer again appealed to the Ninth Circuit claiming that it was entitled to judgment, notwithstanding this Court's decision, on various grounds of statutory construction and collateral estoppel which, it contended, were not decided by this Court. On the second appeal the court below pointed out that these matters had been called to this Court's attention in Monolith's brief in opposition and in a petition for rehearing and concluded that the taxpayer's arguments both as to statutory construction and as to collateral estoppel had been rejected by this Court in deciding the merits of the depletion issue. The taxpayer thereupon filed the instant petition for certiorari, contending that this Court's mandate has been misconstrued and that it is entitled to a hearing on the "remaining issues" in the case.

1. It is entirely clear that the so-called "remaining issues" as to statutory construction are the very issues decided by this Court in *Riddell* v. *Monolith Portland Cement Company,* 371 U.S. 537. First, petitioner contends that, when Congress enacted Public Law

86–781, 74 Stat. 1017, 1018 in 1960, allowing cement manufacturers to elect to apply to past years a new statutory base for depletion, the legislative history explained that those not so electing would be governed by "existing law." Petitioner contends that this legislative history amended the statute to give non-electors the benefit of certain pre-*Cannelton* decisions in the circuit courts which held that finished cement was the cutoff point for mining. In deciding that Monolith's cutoff point was crushed limestone, this Court obviously rejected the contention and determined with finality the very issue that petitioner asked the Ninth Circuit to re-examine.[1]

The other issue of statutory construction which petitioner says remained open after this Court's decision was, for identical reasons, decided by the Court. Relying upon an alleged principle of "non-retroactivity" of decisions as to civil tax liability, the taxpayer contends that the *Cannelton* decision should only be given prospective effect (Pet. 10). But this contention was obviously rejected by this Court in determin-

[1] Petitioner's contention was very plainly without merit. The legislative history did not amend the statute; it meant what it said—that there was no change in the law for non-electors and "existing law" continued in effect for them. Moreover, notwithstanding certain erroneous lower court decisions which controlled in the Ninth Circuit, in deciding *Monolith* this Court was not making new law but restating existing law. As the Court had said in *United States* v. *Cannelton Sewer Pipe Company*, 364 U.S. 76, 87, "ever since the first percentage depletion statute, the cut-off point where 'gross income from mining' stopped has been the same, *i.e.*, where the ordinary miner shipped the product of his mine."

ing that Monolith's cutoff point for depletion should be determined in the same way that Cannelton's cutoff point was determined—*i.e.*, for both it is the point at which "the ordinary miner shipped the product of his mine."

In short, the Ninth Circuit correctly held that both of the issues of statutory construction urged by petitioner have necessarily been resolved against it by this Court.

2. It is far less clear that in its *Monolith* decision this Court rejected the taxpayer's contention that the doctrine of collateral estoppel entitled it to use the same cutoff point for the tax year 1952 as the lower courts had allowed it for the year 1951. This Court need not, of course, pass upon grounds for sustaining a decision below which were not reached and decided by the lower court. It is free either to decide such issues or to leave them for later resolution by the lower courts on remand. The opinion in *Riddell* v. *Monolith Portland Cement Company, supra,* does not mention the issue of collateral estoppel, although it was urged by Monolith in its brief in opposition and petition for rehearing. If the Court now concludes that this issue was not determined by its prior decision. it may wish to vacate the judgment below and remand for consideration by the Ninth Circuit. We believe that this disposition is unnecessary and undesirable, however, because petitioner's claim of collateral estoppel is patently contrary to a controlling decision of this Court, as well as to universally accepted doctrine.

Monolith's sales of limestone in 1951 are plainly separate transactions from its sales of limestone in 1952, although the two groups of sales may be virtually identical in all material respects. It is established that the doctrine of collateral estoppel does not apply to an issue of law decided in litigation arising out of a separate transaction between the parties. The question as to the cutoff point of "mining" for depletion purposes is indisputably such a question of law. See *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76. This is conclusive of petitioner's claim of collateral estoppel.

The principles applicable to collateral estoppel in federal tax litigation have been authoritatively set forth in *Commissioner* v. *Sunnen*, 333 U.S. 591. There the court made unmistakably clear that "if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which occur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue * * *. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." 333 U.S. at 601–602. Since it is

evident that the sales of limestone on which depletion was claimed in 1952 did not involve "the same set of events or documents" as were involved in the sales in 1951, the doctrine of collateral estoppel is inapplicable.

The reasons for the rule adopted in *Sunnen* and controlling here are set forth not only in the *Sunnen* opinion but also in the *Restatement of the Law of Judgments,* which also makes clear that collateral estoppel does not apply to questions of law "except where both causes of action arose out of the same subject matter or transaction." Section 70. After illustrating the principle by noting that a determination that a particular customs classification is applicable to one importation is not conclusive in a subsequent action brought by the government for the recovery of duties on a subsequent importation of an identical article, the *Restatement* explains that "it would obviously be unjust to apply one rule to one importer on the ground that the question of law was *res judicata* as to him and to apply a different rule to other importers." *Restatement,* 1948 Supp., Comment f. Similarly, it would obviously be unjust to continue to apply one rule of law to determine Monolith's depletion allowance for years after 1951 and to apply a different rule of law to all other taxpayers. These policies are particularly applicable in a case such as this where a subsequent decision of this Court has made it clear that the taxpayer has erroneously obtained an advantageous ruling on a question of law in one year and is attempting to

perpetuate the advantage despite an intervening decision which makes the error of the early holding clear and makes that holding unavailable to other taxpayers. The doctrine of collateral estoppel, in short, does not create a private body of law for determining the legal consequences of separate future transactions between the same two parties. See Scott, *Collateral Estoppel by Judgment,* 56 Harv. L. Rev. 7–10, and *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 843–845.

Since we believe that no useful purpose would be served by granting the petition in order to resolve "the purely procedural" question which the taxpayer presents, we respectfully submit that the petition should be denied.

ARCHIBALD COX,
Solicitor General.

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